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July 30, 2010

Corbin R. Davis, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2009-19
proposed amendment to MCR 6.508

Dear Mr. Davis and Members of the Supreme Court:

As a member of the State Bar of Michigan since 1982, I am writing to express my opposition to a proposal to change the Motion for Relief from Judgment rules to impose a one year deadline on such motions.

The unfortunate reality that I have found again and again is that many appeal attorneys have missed important legal issues in cases that ought to have been raised. For example, in the case of Mr. A, involving a conviction for first degree murder, the appeal attorney raised 2 issues in 3 pages of argument, one of which was less than a page long, and the other of which made a claim of an event which, in fact, never happened. When I got the case, several years after the first appeal lost, I was able to find 8 worthwhile legal issues to raise. The first appeal, because of the actions of the appeal attorney, turned out to be barely an appeal at all. But for the existence of the Motion for Relief from Judgment remedy, the constitutional principle of right to appeal would have been frustrated in actuality, though preserved in form.

There was tremendous value, not only to the defendant, but to the court system itself, to see that the grievances about trial procedures were fairly heard and determined, and were seen to have been so treated. This is so even though the court system ultimately rejected the claims I presented. Yet, Mr. A would have gotten no review at all if the proposed rule had been in force.

This is by no means a rare occurrence. In the case of Mr. B, the attorney on appeal filed an *Anders* brief claiming no issues were available to raise. I ended up raising 7 issues, one of which actually won.

The fact of attorneys overlooking issues, or not handling a case diligently, often results in injustice, because when I file a Motion for Relief from Judgment in such cases, not many judges will give the Motion for Relief from Judgment serious consideration under the existing rules. To make rules that take away even that limited opportunity, in my view, is heading in exactly the wrong direction.

The injustice can be particularly acute in those cases where the trial attorney acts as the appeal attorney as well. Such an attorney cannot reasonably be expected to raise ineffective assistance of counsel against himself. In the case of Mr. C, I filed a Motion for Relief from Judgment (which happened to be within the 1 year period, but could easily have been longer) focusing on ineffective assistance of trial counsel, which also ultimately won. At the end, the main question litigated was whether Mr. C should get a new trial or a complete dismissal. But suppose there had been some delay? Then, of course, Mr. C would have gotten no remedy at all.

The effects of the proposed time limits are likely to be considerable and widespread when one remembers that many convicted persons are poorly educated and will not know that the court rule even exists. If they are referred to the court rule, they may not be able to find it, or read it, or comprehend it. Those factors, in my view, would directly affect the result under the proposed rule, but would be unrelated to the actual justice or injustice of the conviction and the procedures used to accomplish the conviction.

I believe that the proposed limitations directly and improperly would contradict what the Legislature has to say on the subject. MCL 770.1 states:

> "The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs."

MCL 770.2 states, in pertinent part:

> "(4) If the applicable period of time prescribed in subsection (1) or (2) has expired, a court of record may grant a motion for a new trial for good cause shown."

The Legislature did not see fit to place these time limitations on the granting of a Motion for New Trial. It is my position that it is inappropriate for the courts to lessen their workloads by inventing rules, at odds with legislation, imposing time limits that the Legislature did not impose.

I point out that keeping the present rule as to time limits will not expand Habeas Corpus review of those cases, since the Habeas Corpus time limitations will apply to prevent issues raised in state court, after the one year period, from being timely to bring in federal court.

Yet, it is true that the state courts have a greater responsibility to ensure fairness and fair results in state court cases, while the federal courts have a more limited role in that regard. It is my position that the state courts should provide more than the minimum that the federal courts will allow.

It also is my position that the courts should remain open to hear complaints of convicted persons. This was once the official position of the United States Supreme Court, though of course that has changed to some degree. See *Pennsylvania ex. rel. Herman v. Claudy*, 350 U.S. 116 (1956), where the Supreme Court unanimously held:

> "Nor was petitioner barred from presenting his challenge to the conviction because 8 years had passed before this action was commenced. Uveges did not challenge his conviction for 7 years. 335 U.S. 437, 438-439. And in a later case we held that a prisoner could challenge the validity of his conviction 18 years after he had been convicted. *Palmer v. Ashe*, 342 U.S. 134. The sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy."

Understanding that that principle is unlikely to be adopted, I have an alternate proposal, which adopts a deadline based on statutory principles, specifically, the Statute of Limitations. As this Court knows, for some felonies the Statute of Limitations is 6 years, for others 10 years, and for still others there is no limitation period. Why not adopt those limitations? After all, it is somewhat incongruous to give the Government many years in which to bring charges, but give the citizen very little time in which to bring challenges to the conviction. By making those periods equal (time to prosecute, and time to challenge the conviction) the government would display a willingness to treat the same crime as being of equal seriousness no matter whose ox is being gored, and that places individuals on a roughly level playing field against the government.

I was admitted as an attorney in 1982, and have practiced primarily in appellate cases. In my first 10 years of practice, I had leave to appeal granted at the Michigan Supreme Court 4 times. In my last 10 years of practice, I have had leave to appeal granted at the Michigan Supreme Court zero times. Is this because I was a much better lawyer than when I started out, or is it because of a trend over time for the Michigan Supreme Court to care less about fairness to the individual and care more about the practicalities of reducing judicial workloads? And is it not time to put the brakes on that trend, rather than accelerate it as the present proposal would do?

In fact, it is my view that the Michigan Supreme Court should scrap the Motion for Relief from Judgment rules altogether, and allow parties to proceed under the Motion for New Trial procedure established by the Legislature. The present Motion for Relief from Judgment rules are severely flawed because they allow an issue to be rejected because it could have been raised in the appeal of right. That provision by itself eliminated at least 80% of the value of the legislatively granted Motion for New Trial right. The present proposal will take away another 10% or so of the value of this right. It simply cannot be justified, except by the principle that prosecutors should always win and individuals always lose, a principle which embodies unfairness at its heart.

Because I do not believe the Michigan Supreme Court at this time can stand the proposition that citizens should enjoy the rights established by legislation, I am not presently calling for the repeal of the Motion for Relief from Judgment rules that take away that which the legislature has granted. I simply want to limit this raiding of the people's rights to its present proportions, and not expand the injustices.

If a public hearing is ever held on these proposals, I would welcome the chance to attend. Please let me know.

Sincerely,

James S. Lawrence